93-677

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WALTER ELIAS ISQUIERDO
Petitioner

VS.

THE UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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APPENDIX TABLE OF CONTENTS

	Page
Cover.....	A-1
Table of Contents.....	A-2
Opinion of The Fifth Circuit Court of Appeals.....	A-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2273

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER ELIAS ISQUIERDO

Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Texas

(CR-H-91-0151-07)

(July 28, 1993)

Before KING and JOLLY, Circuit Judges, and PARKER[1], District Judge.

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[1] Chief district Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM: [2]

Walter Isquierdo was convicted by a jury in federal district court of conspiracy to possess in excess of five kilograms of cocaine with intent to distribute. The jury also convicted him of aiding and abetting his co-defendants in the possession of more than five kilograms of cocaine with intent to distribute. The district court sentenced him to sixteen years of confinement and to a five-year term of supervised release. Isquierdo appeals from his conviction and sentence. We affirm.

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[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. Discussion

A. The Sufficiency of the Evidence

Isquierdo argues that the evidence produced by the government at trial was insufficient to support his convictions for conspiracy to possess and for aiding and abetting his co-defendants in the possession of cocaine. Because Isquierdo did not renew his motion for judgment of acquittal at the close of all the evidence, our review of his case is limited to the determination of whether the record is "devoid of evidence pointing to guilt." United States v. Daniels, 957 F.2d 162, 164 (5th Cir. 1992) (quoting United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir. 1989)) (emphasis added). Careful consideration of the record reveals ample evidence to support isquierdo's conviction on both of the

charges. We accordingly find his claims of insufficient evidence to be without merit.

B. The Evidentiary Rulings

Isquierdo also argues that the district court erred when it refused to submit to the jury a copy of a co-defendant's plea agreement with the government. the district court ruled that the agreement was irrelevant and would be prejudicial both to Isquierdo and to the government. We review evidentiary rulings for abuse of discretion. United States v. Liu, 906 F.2d 449, 452 (5th Cir. 1992), cert. denied, 113 S.Ct. 418 (1992). The district court has "wide discretion in determining relevance." United States v. Rodrigo, 934 F.2d 595, 597 (5th Cir. 1991) (quoting United States v. Silva, 748 F.2d 262 (5th Cir. 1984)), cert. denied, 112

S.Ct. 641 (1991). Similarly, "[the] balancing of probative value against prejudice is committed to the sound discretion of the trial judge . . . ." United States v. Maceo, 947 F.2d 1191, 1199 (5th Cir. 1991) (quoting United States v. Thompson, 837 F.2d 673, 677 (5th Cir. 1988), cert. denied, 488 U.S. 832 (1988)), cert. denied, 112 S.Ct. 1510 (1992). After a thorough reading of the record, we conclude that the district court did not abuse its discretion when it excluded the plea agreement from the evidence submitted to the jury.

It is further argued that the district court abused its discretion when it admitted evidence of an extraneous offense committed by Isquierdo. This court has established a two-step test for determining whether to admit extrinsic-

offense evidence:

> First, it must be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice . . . .

United States v. Beechum, 582 F.2d 898, 910 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979) (footnote omitted). If a party requests that the probative value of the evidence be weighed against its prejudicial effect, the court must make an on-the-record finding to that effect unless the relevant factors for the evaluation are "readily apparent from the record." Maceo, 947 f.2d at 1191 nn.3-4. In the case at hand, Isquierdo failed to request a Beechum finding. Moreover, even is such a finding had been requested, the record in this case makes apparent the factors of the district court's

evaluation. We accordingly reject Isquierdo's argument.

C. The Jury Instruction

Isquierdo also argues that the district court erred in refusing to submit to the jury an instruction on multiple conspiracies. A defendant is entitled to have the jury instructed on a defense theory if there exists in the record sufficient evidence to allow a reasonable juror to rule in favor of the defendant on that theory. United States v. Stowell, 953 F.2d 188, 189 (5th Cir. 1992), cert. denied, 112 S.Ct. 1269 (1992). In the case at hand the evidence in the record only showed participation in the charged conspiracy and provided no grounds to establish the existence of a separate conspiracy between Isquierdo and Garcia. We therefore support the district court's

refusal to submit an instruction on multiple conspiracies to the jury.

D. The Sentencing Enhancement

Finally, Isquierdo argues that there was insufficient evidence for the district court to find that he possessed a firearm during the commission of the offenses for which he was convicted, and therefore to increase his base offense level for sentencing purposes. We review the district court's factual finding that Isquierdo possessed a firearm during the commission of his offense only for clear error. United States v. Menesses, 962 F.2d 420, 428 (5th Cir. 1992). Moreover, "[o]nce it is established that a firearm was present during the offense, the district court should apply the [sentencing] enhancement unless it is clearly improbable that the weapon was

connected with the offense." United States v. Webster, 960 F.2d 1301, 1310 (5th Cir. 1992) (citing U.S.S.G. § 2D1.1, comment. (n.3)), cert. denied, 113 S.Ct. 355 (1992). After reviewing the record in light of the above standard, we uphold the sentencing enhancement applied by the district court.

II. Conclusion

for the foregoing reasons, we AFFIRM the conviction and sentencing of Isquierdo on all grounds.